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In the Supreme Court of the United States

OCTOBER TERM, 1980

DENNIS ROY CHOATE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly denied petitioner a hearing to determine whether the Bureau of Customs agent requesting a mail cover made material misrepresentations of fact.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A–1 to A–10) is reported at 619 F. 2d 21. Prior opinions of the court of appeals in this case are reported at 527 F. 2d 748 (*Choate I*) and 576 F. 2d 165 (*Choate II*). The decision of the district court is unreported, although a prior decision of the district court is reported at 422 F. Supp. 261.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1980, and a petition for rehearing was denied on June 3, 1980 (Pet. App. A–11 to A–12). The petition for a writ of certiorari was filed on June 27, 1980. The jurisdiction of this Court is invoked under 28 US.C. 1254(1).

STATEMENT

In April 1972, the Federal Bureau of Customs resumed a previously closed investigation into petitioner's alleged involvement in illegal narcotics activities. As part of the investigation, Agent Williams of the Federal Bureau of Customs wrote to the Postal Inspector of Los Angeles, California, on July 19, 1972, requesting a mail cover[1] of petitioner's first and

[1] Under a "mail cover," a record is made of any data (*e.g.*, postmarks, sender's return address) appearing on the outside cover of first class mail and of the contents of other classes of mail. See 39 C.F.R. 233.2(c)(1). The question in this case involves only data obtained from the exterior of petitioner's first class mail.

fourth class mail for 30 days. Williams' letter advised the Postal Inspector that petitioner was currently under investigation for narcotics smuggling, that Williams believed that petitioner was organizing a smuggling ring with a primary source located in South America, and that it was "felt" that petitioner corresponded by mail with the South American source. See *United States* v. *Choate,* 576 F. 2d 165, 169 (9th Cir.), cert. denied 439 U.S. 953 (1978) (*Choate II*). The Postal Inspector approved the mail cover. *Choate II, supra,* 576 F. 2d at 171–173.

As a result of the mail cover, Williams discovered the identity of various financial institutions with which petitioner dealt. The Customs Service provided the names of these institutions to the Internal Revenue Service, which, in turn, commenced a tax investigation of petitioner and obtained information from the financial institutions identified by the mail cover. Petitioner was subsequently charged by indictment with willfully attempting to evade his taxes for the years 1970 and 1971, in violation of 26 U.S.C. 7201.

Prior to trial, petitioner moved to suppress all of the government's evidence.[2] The district court granted petitioner's motion to suppress, holding that the mail cover was a warrantless search and seizure in violation of the Fourth Amendment. The district court also

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[2] Previously, the trial court had dismissed the indictment upon the ground that the activities of a government informer had violated petitioner's Sixth Amendment right to counsel. Upon the government's appeal, the Ninth Circuit reversed, *United States* v. *Choate*, 527 F. 2d 748 (1975), cert. denied, 425 U.S. 971 (1976) (*Choate I*).

found that the letter requesting the mail cover did not comply with the provisions of the postal regulations, which require that the letter requesting the mail cover "stipulate[] and specif[y] the reasonable grounds that exist which demonstrate the mail cover would aid in the location of a fugitive, or that it would assist in obtaining information concerning the commission or attempted commission of a crime." See 39 C.F.R. 233.2(e)(1)(ii); *Choate II, supra,* 576 F. 2d at 169–172. The court of appeals reversed, holding that the request complied with the Postal Service regulations and that a warrantless mail cover did not violate the Fourth Amendment. *Choate II, supra,* 576 F. 2d at 171–180. This Court denied certiorari. 439 U.S. 953 (1978).

On remand, petitioner again moved to suppress the evidence obtained from the mail cover, contending this time that the facts alleged in the application for the mail cover were intentionally false (Pet. 6–7; Pet. App. A–2; April 16, 1979, Tr. 10–11, 17). The district court denied the motion without a hearing, holding that even if Agent Williams had intentionally misrepresented facts in his letter, suppression was inappropriate. The case was then tried by the court upon stipulated facts, and petitioner was convicted on both counts (April 16, 1979, Tr. 27–29, 34). Petitioner was sentenced to two years' imprisonment and fined $10,000 on each count, the sentences to run concurrently. Execution of the sentence was suspended and petitioner was placed on probation for five years (June 11,

1979, Tr. 50–51).[3] The court of appeals affirmed (Pet. App. A–1 to A–10).

ARGUMENT

Petitioner contends (Pet. 9–14) that the evidence obtained as the result of the mail cover in this case should be suppressed, because the mail cover was allegedly instituted in violation of applicable Postal Service regulations. Specifically, petitioner asserts that the agent requesting the mail cover made intentional false statements regarding the investigation of petitioner and that, without those false statements, the agent's written request for a mail cover did not "specif[y] * * * reasonable grounds * * * which demonstrate [that] the mail cover * * * would assist in obtaining information concerning the commission or attempted commission of a crime." 39 C.F.R. 233.2 (e)(1)(ii). See 39 C.F.R. 233.2(d)(2)(ii)(C).[4] The court of appeals correctly rejected this claim in a decision that does not conflict with any decision of this Court or of any court of appeals. Further review is unwarranted.

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[3] As a condition of probation, petitioner was required immediately to employ in his boat-building business two ex-offenders. Thereafter, he was required to hire one additional ex-offender each month until he was employing six ex-offenders in his business. The terms of probation required petitioner to maintain the employment of the six ex-offenders during the entire probationary term. The fine was to be reduced by permitting petitioner to deduct $2,000 from the fine each year for his participation in the employment program. Alternatively, petitioner's fine would be reduced by $2,000 each year if petitioner contributed $2,000 each year to a charitable fund (June 11, 1979, Tr. 50–51).

[4] Petitioner does not contest that the requesting letter, if accurate, fully satisfied the Postal Service regulations.

First, even assuming that the violation of the Postal Service mail cover regulations could ever be the basis for suppressing evidence in a criminal case, petitioner failed to make a substantial preliminary showing that the agent's request for a mail cover contained material false statements. In *Franks* v. *Delaware,* 438 U.S. 154 (1978), this Court made clear that a district court need not conduct an evidentiary hearing with regard to conclusory or unsubstantiated allegations regarding the falsity of an affidavit supporting a search warrant (*id.* at 171; emphasis added):

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those *allegations must be accompanied by an offer of proof.* They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. *Affidavits or swo n or otherwise reliable statements of witnesses should be furnished,* or their absence satisfactorily explained.

Here, petitioner argues that the initial investigation of petitioner had terminated in 1971, that the agent's own testimony shows that he had no more recent information supporting his request for a mail cover, and that his allegations regarding petitioner's involvement in a South American drug ring were therefore obviously fabricated. In *Choate II,* however, the court below considered and rejected this claim, noting that the investigation had been "reopened by Special Agent

Lynn Williams on April 3, 1972, because of *additional* information received by the Bureau of Customs * * * [and] was continuing even at the time of the * * * 1976 hearings" and that the agent's testimony "can be read consistently with the contents of the letter" (576 F. 2d at 173 (emphasis supplied)).[5] Because petitioner's renewed motion to suppress following *Choate II* was not accompanied by any new affidavits or offer of proof, the district court was not required to conduct an evidentiary hearing even under the principles of *Franks* v. *Delaware, supra.*

In any event, the courts below correctly concluded that even if the request for a mail cover contained material misrepresentations in violation of agency

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[5] Agent Williams testified that upon reopening the investigation he determined that petitioner, who had no apparent substantial source of income other than his illicit activities, had recently bought two cars and a sailboat and that these large cash expenditures confirmed the reports of an informant regarding petitioner's drug trafficking activities (July 13, 1976 Tr. 52, 55–56). In addition, in an affidavit filed with the district court on remand from *Choate II*, Williams stated that at the time he made the request, he had been informed by his supervisor that an informant named Tommy claimed that petitioner was still actively engaged in drug dealing (Williams Affidavit of March 14, 1979, ¶¶ 5 & 9; April 16, 1979 Tr. 12).

We further note that even if the information underlying the request were in fact a year old rather than current, it is not apparent that that discrepancy is material to a request for a mail cover. Although year-old information might well be insufficient to support a finding of probable cause, the Postal Service regulations require only a reasonable basis for believing that the mail cover will aid in the detection of crime. Since a year-old informant's report would appear to satisfy that requirement, the district court was not required to conduct a hearing on an essentially immaterial point. See *United States* v. *DePoli*, No. 79–1465 (2d Cir. July 31, 1980), slip op. 4870–4872.

regulations, the evidence obtained as the result of that mail cover was admissible at trial. It is well settled that mail covers, which involve only the recording of information publicly exposed on the outside of various envelopes, do not violate the Fourth Amendment. See, *e.g.*, *United States* v. *Van Leeuwen*, 397 U.S. 249, 251 (1970); *United States* v. *DePoli*, No. 79–1465 (2d Cir. July 31, 1980), slip op. 4872; *United States* v. *Huie*, 593 F. 2d 14 (5th Cir. 1979); *United States* v. *Bianco*, 534 F. 2d 501 (2d Cir.), cert. denied, 429 U.S. 822 (1976); *United States* v. *Balistrieri*, 403 F. 2d 472 (7th Cir. 1968); *Lustiger* v. *United States*, 386 F. 2d 132 (9th Cir. 1967), cert. denied, 390 U.S. 951 (1968); *Canaday* v. *United States*, 354 F. 2d 849 (8th Cir. 1966); *United States* v. *Schwartz*, 283 F. 2d 107 (3d Cir. 1960). See also *Smith* v. *Maryland*, 442 U.S. 735 (1979); *United States* v. *Miller*, 425 U.S. 435, 442 (1976). Indeed, we do not understand petitioner to contend otherwise.

Rather, petitioner's sole claim is that the violation of the Postal Service's regulations compels suppression of the evidence obtained as a result of the mail cover. But in *United States* v. *Caceres*, 440 U.S. 741, 755–756 (1979), the Court held that, ordinarily at least, the violation of an agency rule not required either by statute or by the Constitution is not an appropriate basis for suppressing relevant evidence in a criminal case.[6] See also *United States* v. *Payner*,

[6] The Court declined to rule on the government's contention that Fed. R. Evid. 402 and 18 U.S.C. 3501 prohibit the exclusion of relevant evidence in the absence of a constitutional or statutory violation. See 440 U.S. at 755 & n.22.

No. 78–1729 (June 23, 1980). Petitioner argues that *Caceres* is distinguishable insofar as that case involved a good faith violation of agency regulations, whereas here Agent Williams' purported violation of the regulations was allegedly willful.[7] Petitioner cites no authority for this narrow reading of *Caceres,* and we are aware of none. In the absence of a conflict and in light of the paucity of petitioner's allegations regarding the falsity of the agent's request for a mail cover, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] Petitioner also suggests that *Miller* v. *United States*, 357 U.S. 301 (1958), is controlling here because the agent's false request violated 18 U.S.C. 1001. *Miller*, however, involved an arrest in violation of both statutory and common law principles designed to protect the arrestee's home. Here, in contrast, the mail cover did not violate any statute or the Constitution. At worst, the agent's request arguably violated Section 1001 which is designed to protect the agency and not an individual such as petitioner.

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